No. 17-1091

IN THE
Supreme Court of the United States

TYSON TIMBS AND A 2012 LAND ROVER LR2,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

On Writ of Certiorari to the Indiana Supreme Court

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the Excessive Fines Clause, via the Due Process Clause, is incorporated against state *in rem* forfeitures.

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INTRODUCTION

This case began with the State of Indiana's routine *in rem* forfeiture action against Tyson Timbs's Land Rover. Indiana law authorizes forfeiture of the Rover because Timbs used it to traffic heroin, but he argues that its value far exceeds the gravity of his crime and that the Eighth Amendment's Excessive Fines Clause—which he contends applies to the States under the Fourteenth Amendment—bars the forfeiture.

Timbs's claim fails at the starting gate: The Excessive Fines Clause does not impose a proportionality requirement on state *in rem* forfeitures, a feature of American law for more than three hundred years. *See C. J. Hendry Co. v. Moore*, 318 U.S. 133, 137–52 (1943). Even though forfeitures sometimes produce harsh results—the owner's innocence "has almost uniformly been rejected as a defense," *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974)—courts did not suggest that the Excessive Fines Clause might limit *in rem* forfeitures until the last quarter of the twentieth century. Indeed, only five earlier state-court cases even *mentioned* the argument Timbs makes here; all squarely rejected it.

The history of *in rem* forfeitures suggests two possible conclusions: the Excessive Fines Clause does not apply to *in rem* forfeitures—potentially conflicting with *Austin v. United States*, 509 U.S. 602, 621–22 (1993)—or the Fourteenth Amendment does not apply the Clause against the States. Either way, history requires the Court to reject Timbs's claim.

STATEMENT OF THE CASE

The investigation into Timbs's heroin trafficking began with a tip from a confidential informant and continued with two controlled drug purchases; each time, officers bought two grams of heroin from Timbs and scheduled a subsequent sale. Pet. App. 2. Police arrested Timbs and seized the Rover while he was on his way to the third sale. Hr'g. Tr. 13:13–25; 14:06–08 (July 15, 2015). While he was in custody, Timbs told officers that he would use the Rover to pick up heroin several times a week, Hr'g. Tr. 14:09–15:18, and at the forfeiture hearing, he said that doing so put "a lot" of miles on the vehicle. Hr'g. Tr. 36:09–14.

The State charged Timbs with two counts of Class B felony dealing in a controlled substance and one count of Class D felony conspiracy to commit theft. Pet. App. 3. Timbs pled guilty to the conspiracy count and one of the drug-dealing counts in exchange for dismissal of the remaining dealing charge. *Id.* The court sentenced Timbs to one year of home detention and five years of probation; Timbs also agreed to pay investigation costs of $385, an interdiction fee of $200, court costs of $168, a bond fee of $50, and a court-certified drug-and-alcohol assessment fee of $400, for a total of $1,203.00 in fees and costs. *Id.*

Indiana law authorizes the State to bring "an action for forfeiture" against property seized as an instrumentality of certain crimes, Ind. Code § 34-24-1-3(a), including vehicles used to transport heroin, *id.* § 34-24-1-1(a)(1)(A). The forfeiture action is entirely separate from any criminal prosecution, and, because

the State brings the action against the property itself, the action is a proceeding *in rem*. *C.R.M. v. State*, 799 N.E.2d 555, 558 (Ind. Ct. App. 2003). The federal government and nearly every other State utilize similar *in rem* forfeiture proceedings. *See United States v. Bajakajian*, 524 U.S. 321, 333 (1998) ("Instrumentalities historically have been treated as a form of 'guilty property' that can be forfeited in civil *in rem* proceedings."); Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 Yale L.J. 2446, 2451 (2016) (observing that most States have broad laws authorizing civil forfeiture, though eight States require predicate criminal convictions and one State has eliminated the procedure).

Accordingly, after the State seized the Rover, but while Timbs's criminal case was still pending, private lawyers acting under the authority of an elected prosecuting attorney filed a complaint on the State's behalf seeking forfeiture of the Rover under Indiana Code section 34-24-1-1(a)(1)(A). Compl. for Forfeiture (Aug. 5, 2013). Timbs's answer denied the allegations without raising any constitutional arguments. Answer (Aug. 29, 2013). After Timbs had pled guilty, the trial court held a hearing on the State's forfeiture action, and it found that the Rover met the statutory criteria for forfeiture because it was used to "transport . . . [a] controlled substance for the purpose of committing . . . [the crime of d]ealing in a schedule I . . . controlled substance . . . ." Ind. Code § 34-24-1-1(a)(1)(A); *see* J. Order ¶ 3 (Aug. 28, 2015).

Nevertheless, the trial court held—without hearing any argument from the parties on the point—that

the forfeiture would violate the Excessive Fines Clause. *Id.* ¶ 8. It noted that the Rover was valued at about $40,000, *id.* ¶ 1, and that the maximum fine applicable to the drug-dealing charge to which Timbs had pled guilty was $10,000, *id.* ¶ 6. Although Indiana law sets $10,000 as the maximum fine for *all* felonies, including murder, Ind. Code §§ 35-50-2-3 to -7, the trial court concluded that the approximately four-to-one ratio between the value of the Rover and the maximum fine for the drug-dealing charge was "grossly disproportional" and therefore unconstitutional under the Excessive Fines Clause. J. Order ¶¶ 7–8 (Aug. 28, 2015).

After filing an unsuccessful motion to correct error, the State appealed the trial court's decision, which the Indiana Court of Appeals affirmed. Pet. App. 17–24. The State then sought transfer to the Indiana Supreme Court, which reversed, holding that the Excessive Fines Clause does not bar the forfeiture because the Fourteenth Amendment does not incorporate the Excessive Fines Clause against the States. Pet. App. 9–10.

SUMMARY OF ARGUMENT

1. The question presented by this case is whether the right Timbs claims—that is, the right to be free from disproportionate *in rem* forfeitures—is "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition." *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (internal quotation marks and emphasis omitted). Timbs

recognizes that this question is answered by examining the historical evidence. Pet. Br. 9–25. He is mistaken, however, about *which* evidence is relevant. Because this case involves an *in rem* forfeiture, the question is not whether *in personam* fines were traditionally subject to proportionality review, *cf. id.*, but instead whether proportionality requirements were historically applied to *in rem* forfeitures.

The Court should also reject the urging of *amici* to discard the settled framework for deciding incorporation questions in favor of constructing a new incorporation doctrine from the ground up. The historically informed, straightforward approach the Court described and used in *McDonald* is "well established." 561 U.S. at 750. Upsetting current doctrine would create numerous collateral consequences, all without changing the answer to the question presented by this case: The right Timbs claims is neither fundamental to nor deeply rooted in, America's legal tradition and therefore does not apply against the States.

2. For the vast majority of American history, *in rem* forfeitures have not been subject to a proportionality requirement. Even before the Revolution, authorities brought *in rem* proceedings against property used to violate the law. These proceedings sometimes resulted in severe consequences; courts have always rejected, for example, the innocence of the forfeited property's owner as a defense. Yet, in spite of the many opportunities to complain of "disproportionate" *in rem* forfeitures, not a *single* decision issued prior to the end of the twentieth century said that either a fed-

eral or state Excessive Fines Clause imposes a proportionality requirement on these forfeitures—even though virtually every State has such a Clause and even though courts regularly enforced Excessive Fines Clauses against criminal fines. The only five state-court cases prior to 1988 even to *acknowledge* the possibility of an Excessive Fines Clause limit on *in rem* forfeitures all explicitly rejected it. The courts' silence is powerful evidence that no such proportionality requirement exists, particularly in light of *other* challenges occasionally brought against *in rem* forfeitures based on constitutional provisions having nothing to do with proportionality.

The traditional conception of *in rem* forfeitures explains why the Excessive Fines Clause is inapplicable here. As multiple nineteenth-century treatises explained, *in rem* forfeitures are not penalties, and the Excessive Fines Clause applies only to a "*punishment* for some offense," *Austin v. United States*, 509 U.S. 602, 610 (1993) (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)). And it is hard to see how any proportionality requirement could be squared with courts' consistent approval of *in rem* forfeitures suffered by innocent owners.

3. The historical evidence establishes that, both before and after the ratification of the Fourteenth Amendment, the American legal tradition did not consider *in rem* forfeitures to be subject to a proportionality requirement. Accordingly, two potential interpretations are available. The better interpretation reads the Excessive Fines Clause *not* to apply to *in*

rem forfeitures and thereby fully harmonizes the historical evidence: It explains why Timbs cites many courts and commentators calling excessive *fines* unconstitutional but no authorities saying the same about *in rem* forfeitures. And *Austin*, which held that the Excessive Fines Clause *does* apply to two specific *federal in rem* forfeitures, is no reason to refuse to hold the Excessive Fines Clause inapplicable to *state in rem* forfeitures. If anything, the Court's subsequent decisions—to say nothing of the historical evidence—have undermined *Austin*'s reasoning.

If the Court interprets the Excessive Fines Clause to encompass *in rem* forfeitures, however, historical evidence permits just one other interpretation—that the Clause does not apply to the States. No evidence demonstrates that the American legal tradition ever recognized a rule prohibiting state *in rem* forfeiture of an instrumentality of crime where the value of the property is disproportionate to the seriousness of the violation. In short, no right of *in rem* forfeiture proportionality is "deeply rooted" in American history or tradition. *McDonald*, 561 U.S. at 767. The right Timbs claims, therefore, cannot be applied against the States.

ARGUMENT

I. The Question Before the Court Is Whether the Excessive Fines Clause, Via the Due Process Clause, Imposes a Proportionality Requirement on State *In Rem* Forfeitures

A. The Court should ask whether a proportionality requirement for *in rem* forfeitures is a fundamental and deeply rooted feature of American law

Reaching the right answer in this case requires first asking the right question. *Cf. Arizona v. Hicks*, 480 U.S. 321, 333 (1987) (O'Connor, J., dissenting) ("The Court today gives the right answer to the wrong question."). Here the right question is not whether the Excessive Fines Clause is incorporated as a general matter, but whether the Clause, in conjunction with the Fourteenth Amendment, prohibits the particular state action against which Timbs has lodged a constitutional objection—the *in rem* forfeiture of his Rover as an instrumentality of drug trafficking. *See* Ind. Code § 34-24-1-1. Timbs claims a constitutional right to be free from "disproportionate" *in rem* forfeitures. *See* Pet. Br. 6–7 (discussing decisions below accepting this argument); *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) ("The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality."). To enforce this right against Indiana, he must show that it "is fundamental to our scheme of ordered liberty, or as we have said in a related context, . . . is deeply rooted in this Nation's history and tradition." *McDonald v. City of Chicago*,

561 U.S. 742, 767 (2010) (internal quotation marks and emphasis omitted).

1. The Court must examine the history of *in rem* forfeitures because the Court's incorporation cases frame the incorporation question in terms of the specific right asserted. In *McDonald*, for example, the Court did not look at the history of the Second Amendment in general but examined the history of the "right to keep arms for self-defense." *Id.* at 768; *see also id.* at 789 (rejecting arguments against "the case for incorporation of the right to keep and bear arms for self-defense").

The Courts' other incorporation cases have taken the same right-specific approach. For example, rather than incorporate all of the rights encompassed by the first clause of the Fourth Amendment all at once—"the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated," U.S. Const. amend. IV—the Court first incorporated the Clause's reasonableness requirement, *Wolf v. Colorado*, 338 U.S. 25 (1949), and about fifteen years later incorporated the Clause's warrant requirement, *Aguilar v. Texas*, 378 U.S. 108 (1964). *See also McDonald*, 561 U.S. at 764 n.12. Similarly, rather than incorporate the "right to . . . an impartial jury," U.S. Const. amend. VI, wholesale, the Court has held that this Clause requires States to provide a jury trial to defendants charged with serious offenses, *Duncan v. Louisiana*, 391 U.S. 145 (1968), but that it does *not* incorporate a right to a unanimous verdict, *Apodaca v. Oregon*, 406 U.S. 404 (1972).

Focusing on the specific claimed right is particularly important here because the forfeiture Timbs challenges is very different from the criminal fines to which his historical evidence relates. The State imposed the forfeiture pursuant to an *in rem civil* proceeding against the Rover, not an *in personam criminal* proceeding against Timbs. *See C.R.M. v. State*, 799 N.E.2d 555, 558 (Ind. Ct. App. 2003); *see also Anonymous Case*, 1 Gal. 23 (1812) (Story, J.) ("[I]t is not true, that informations *in rem* are criminal proceedings. On the contrary, it has been solemnly adjudged that they are civil proceedings."). The validity of the forfeiture therefore turns not on *Timbs's* culpability but on the *Rover's*—whether it was used to transport drugs for the purpose of drug dealing. *See* Ind. Code § 34-24-1-1. And Indiana courts determine which—or how much—property goes to the State by considering the property's *involvement* in the crime, not the crime's *severity*. *Id.*

Timbs ignores this distinction. He frames the question presented at a high level of generality, asking "[w]hether the Eighth Amendment's Excessive Fines Clause is incorporated against the States under the Fourteenth Amendment," without addressing *in rem* forfeitures in particular. Pet. Br. i. And virtually all of the historical evidence he presents relates to criminal fines, not *in rem* forfeitures. *Id.* at 11–27.

Timbs's focus on criminal fines ignores the right-specific nature of the Court's incorporation cases, and it ignores the Court's role, which is "to decide concrete cases and not abstract propositions of law." *Upjohn Co. v. United States*, 449 U.S. 383, 386 (1981).

Whether the Constitution would prohibit a hypothetical $40,000 criminal fine for Timbs's crime is irrelevant. The only relevant question is whether the Constitution—specifically, the Excessive Fines Clause, via the Fourteenth Amendment—imposes a proportionality requirement on the State's *in rem* forfeiture of his Rover.

2. Even if the Court were to view the incorporation question at a higher level of generality and ask whether the Excessive Fines Clause *as a whole* is fundamental to, and deeply rooted in, the American legal tradition, the history of *in rem* forfeitures still would be essential to reaching the right answer. The Excessive Fines Clause can be "incorporated in the concept of Due Process" *in toto* only if *all* its protections—including its purported protection against disproportionate *in rem* forfeitures—are "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition." *McDonald*, 561 U.S. at 767 (internal quotation marks and emphasis omitted). The historical pedigree of the Excessive Fines Clause's restriction against disproportionate criminal penalties cannot by itself justify applying *other* purported constitutional limitations against the States.

The Court has *never* applied a purported constitutional limitation against the States after finding that it fails the "fundamental . . . or . . . deeply rooted" test. *McDonald*, 561 U.S. at 767. In *McDonald*, for example, the Court marshalled statements from the founding and Fourteenth Amendment ratification periods demonstrating that "the Framers and ratifiers of the

Fourteenth Amendment counted the right [to keep and bear arms for self-defense] among those fundamental rights necessary to our system of ordered liberty." *Id.* at 767–78. *See also, e.g., Mapp v. Ohio*, 367 U.S. 643, 656–57 (1961) ("We find that . . . as to the States, the freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions do enjoy an 'intimate relation' in their perpetuation of 'principles of humanity and civil liberty (secured) . . . only after years of struggle.'" (second ellipsis in original)); *Duncan*, 391 U.S. at 149 ("Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases.").

Contrariwise, in *Apodaca*, the Court concluded that the jury-unanimity requirement is not sufficiently fundamental to justify application against the States. *See* 406 U.S. at 373 (Powell, J., concurring in the judgment) (explaining that "[t]he question . . . is whether unanimity is in fact so fundamental to the essentials of jury trial that this particular requirement of the Sixth Amendment is necessarily binding on the States under the Due Process Clause of the Fourteenth Amendment").

In short, there is no precedent for incorporating all limitations recognized by a clause in the Bill of Rights where some of those limitations lack fundamental grounding in American history and traditions.

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Whether the Court views the incorporation inquiry on a right-by-right or a clause-by-clause basis, it should focus on *in rem* forfeitures specifically—not merely *in personam* fines. Timbs must identify historical evidence showing that the American legal tradition has consistently applied, and recognized as significant, his claimed right to a proportionality requirement for *in rem* forfeitures. *See McDonald*, 561 U.S. at 767. History is particularly important here because the meaning of the Excessive Fines Clause, as in "other Eighth Amendment contexts," is "illuminated by its history." *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 264 & n.4 (1989). "The applicability of the Eighth Amendment always has turned on its original meaning, as demonstrated by its historical derivation." *Id.* at 264 n.4 (quoting *Ingraham v. Wright*, 430 U.S. 651, 670 n.39 (1977)). The history forecloses Timbs's argument: *In rem* forfeitures have been common throughout American history, but courts did not recognize the right Timbs claims—much less declare it fundamental—until the end of the twentieth century. *See infra*, Part II.

B. The Court should not revisit whether incorporation should occur via the Privileges or Immunities Clause

As Timbs recognizes, the Court's incorporation doctrine has long "been built upon the substantive due process framework," Pet. Br. 37 (quoting *McDonald*, 561 U.S. at 812 (Thomas, J., concurring in part and concurring in the judgment)). Timbs briefly suggests that the Fourteenth Amendment's Privileges or

Immunities Clause provides an alternative basis for incorporating the Excessive Fines Clause against the States, *id.* 37–38, but—unlike some *amici*, Cause of Action Inst. Amicus Br. 10–16; Am. Civil Rights Union Amicus Br. 12–20—he wisely does not ask the Court to depart from its "long established and narrowly limited" incorporation doctrine. *McDonald*, 561 U.S. at 791 (Scalia, J., concurring). The Court should not use this case to rebuild incorporation doctrine on a new foundation.

1. First, there is no reason for the Court "to reconsider" incorporation via the Privileges and Immunities Clause, "since straightforward application of settled doctrine suffices to decide [this case]." *Id.* Timbs does not argue that considering incorporation under the Privileges or Immunities Clause would meaningfully change the analysis here. Pet. Br.at 38 (asserting that the right to be free from excessive fines "was regarded as fundamental long before the Founding" and citing prior historical discussion arguing for incorporation under the Due Process Clause). And there is no reason to believe it would: In *McDonald*, the Court's most recent incorporation case, Justice Thomas's concurrence concluded that the Privileges or Immunities Clause incorporates the right to bear arms for self-defense on the basis of much of the same historical evidence discussed in the Court's Due Process Clause analysis. *See McDonald*, 561 U.S. at 844–50 (Thomas, J., concurring in part and concurring in the judgment); *id.* at 838 ("As the Court demonstrates, there can be no doubt that § 1 was understood to enforce the Second Amendment against the States." (citing the opinion of the Court)).

Under both the Due Process Clause and the Privileges or Immunities Clause, the imposition of a proportionality requirement to States' *in rem* forfeitures turns on whether historical evidence shows widespread acceptance and recognition of the importance of this rule.

2. Second, changing the foundation of the Court's incorporation doctrine at this late date—after it has considered incorporation of nearly every provision in the Bill of Rights—could create a host of unpredictable consequences and sow confusion among lower courts and state and local governments.

For example, while the Due Process Clause applies to "any person," the Privileges or Immunities Clause protects "citizens of the United States," U.S. Const. amend. XIV, and a change in the Court's doctrine could leave the country wondering which provisions of the Bill of Rights would apply only to citizens. *Compare McDonald*, 561 U.S. at 815 (Thomas, J., concurring in part and concurring in the judgment) ("The group of rights-bearers to whom the Privileges or Immunities Clause applies is, of course, 'citizens.'"); *with Boumediene v. Bush*, 553 U.S. 723, 743 (2008) ("Because the Constitution's separation-of-powers structure, like the substantive guarantees of the Fifth and Fourteenth Amendments . . . protects persons as well as citizens, foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles." (citations omitted)); *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 309 & n.5 (1970) ("[O]nce an alien lawfully enters and resides in this country he becomes invested with the rights

guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment.").

One *amicus* seizes on this difference to argue in favor of adopting a Privileges or Immunities Clause theory of incorporation, contending that the Excessive Fines Clause thereby protects only citizens. *See* Am. Civil Rights Union Amicus Br. 10–11. Accepting the invitation to reconsider Privileges or Immunities Clause doctrine would require the Court to confront whether and how the Bill of Rights protects *all* persons from unlawful state action.

Discarding the Court's current approach could raise other serious questions. Would the rules the Court has imposed against States and localities pursuant to other provisions of the Bill of Rights remain "clearly established" for the purpose of the Court's qualified immunity doctrine? *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017). Would these prior decisions remain "clearly established Federal law" for the purpose of federal habeas proceedings? *See* 28 U.S.C. § 2254(d)(1). These questions would require urgent answers, and the Court is in no position to provide them prior to a decision to reconsider the basis of incorporation. Such a change is not only unnecessary as a matter of doctrine, but is also irrelevant here.

The Court should continue to apply the standard it has "well established" over numerous cases, *McDonald*, 561 U.S. at 750, and ask whether a proportionality requirement for *in rem* forfeitures is a

"fundamental" and "deeply rooted" feature of our country's legal tradition, *id.* at 767.

II. History Shows That *In Rem* Forfeitures Were Not Originally Understood to Be Subject to an Excessive Fines Clause Proportionality Requirement

The historical evidence all points in a single direction: The right Timbs claims is neither fundamental to, nor deeply rooted in, America's legal tradition. Although *in rem* forfeitures have always existed in American law—and frequently have been harsh—from before the Revolution through most of the twentieth century, no court even suggested that a state or federal Excessive Fines Clause imposed a proportionality requirement on these forfeitures. Unchallenged practice is highly probative of the Constitution's original meaning, and it is particularly so here in light of the *other* constitutional challenges occasionally brought against *in rem* forfeitures, and in light of the application of the Excessive Fines Clause's proportionality requirement to *in personam* fines. Observers sometimes suggested that the Due Process Clause imposes limitations on *in rem* forfeitures—albeit limitations unrelated to proportionality—which makes it all the more striking that they did not identify any proportionality limitation stemming from the Excessive Fines Clause.

The historical understanding of *in rem* forfeitures both explains the silence regarding any Excessive Fines Clause limitation and further substantiates the

significance of this silence. American law has long distinguished *in rem* forfeitures from *in personam* fines; the former are *not* penalties, while the latter are. Because the Excessive Fines Clause applies only to penalties, it does not apply to *in rem* forfeitures. Moreover, any proportionality requirement would fundamentally contradict the longstanding rule that the guilty property of even an innocent owner can be the subject of *in rem* forfeiture, and would do nothing to further the original central purpose of the Excessive Fines Clause.

A. *In rem* forfeitures antedate constitutional ratification and have continued for more than two centuries

1. Authorities in England and America have brought *in rem* proceedings to forfeit property used to violate the law for well over three hundred years. *See C. J. Hendry Co. v. Moore*, 318 U.S. 133, 138 (1943). The English admiralty courts and the Court of Exchequer heard *in rem* proceedings against "articles seized . . . for the violation of law." *Id.* at 137. The Common Law "established [*in rem* procedures] . . . certainly as early as the latter part of the seventeenth century," and courts used *in rem* procedures to combat piracy, smuggling, and unlawful fishing. *Id.* at 137–39 & nn. 2–3 (collecting cases).

The American colonies adopted *in rem* procedures and used them in both admiralty and common law courts. *Id.* at 139. For example, the colonies adopted *in rem* forfeitures to enforce the Navigation Acts as

well as laws regulating imports and the sale and storage of commodities. *See id.* at 139–48 & nn.4–14 (collecting colonial statutes and cases). The procedure "had become a recognized part of the common law system as developed in England and received in this country long before the American Revolution." *Id.* at 149. The American States continued to employ *in rem* forfeitures after separating from Great Britain, both during the period of the Articles of Confederation and following the Constitution's ratification. *Id.* at 149–51.

The Constitution gave the federal government control "over the regulation of trade, navigation and customs duties which had been prolific sources of forfeiture proceedings in the state courts," *id.* at 152, and federal courts, therefore, heard many *in rem* forfeiture proceedings. Such proceedings persisted at the state level after the ratification of the Constitution as well. Antebellum state statutes imposed *in rem* forfeitures for violations of various state laws, including fishing, gambling, waterway, gunpowder, and alcohol regulations.[1]

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[1] *See, e.g., C. J. Hendry Co.*, 318 U.S. at 150 & n.15 (collecting cases regarding state fishing laws); *Davidson v. Blunt*, 16 Ky. 128, 128 (1811) (discussing 1799 Kentucky statute subjecting to *in rem* forfeiture "all money, or property, staked or betted"); *Scott v. Willson*, 3 N.H. 321, 321 (1825) (discussing 1809 New Hampshire statute subjecting to *in rem* forfeiture all un-rafted timber found in the Connecticut river); *Barnacoat v. Six Quarter Casks of Gunpowder*, 42 Mass. 225, 225 (1840) (describing 1833 Massachusetts law subjecting to *in rem* forfeiture gunpowder kept in violation of municipal regulations); *Talmage & Van Pelt v. Fire Dep't of New York*, 24 Wend. 235, 236 (N.Y. Sup. Ct. 1840) (de-

Federal and state use of *in rem* forfeitures continued during the Civil War and expanded into the twentieth century. For example, by the mid-nineteenth century federal revenue laws provided for the *in rem* forfeiture of any property held for the purpose of evading payment of applicable duties. *See* George Boutwell, *The Tax-Payer's Manual* 23–24 (1865); Rufus Waples, *Treatise on Proceedings In Rem* 215–16 (1882) (providing an extensive list of property forfeitable in an *in rem* proceeding under federal revenue laws), cited in *United States v. Bajakajian*, 524 U.S. 321, 330 (1998); Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 698 & n. 5 (3d ed. 1865) (collecting cases).[2] The use of *in rem* forfeitures to enforce state revenue laws was similarly extensive and

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scribing 1830 New York law subjecting to *in rem* forfeiture gunpowder held in quantities exceeding statutory limits); *Our House No. 2 v. State*, 4 Greene 172, 174 (Iowa 1853) (discussing Iowa statute providing for the *in rem* forfeiture of "dram shops").

[2] The third edition of Bishop's *Commentaries on the Criminal Law*, published in 1865, was the most recent edition circulating during the period of the Fourteenth Amendment's framing and ratification. The fourth edition of Bishop's treatise was published in 1868, the year the Fourteenth Amendment was ratified, and its discussion of *in rem* forfeitures is virtually identical to the third edition's. *See* Joel Prentiss Bishop, *Commentaries on the Criminal Law* §§ 694–709 (4th ed. 1868). Because the third edition offers the most direct evidence of the understanding of constitutional rights held by the Fourteenth Amendment's framers and ratifiers, all citations to Bishop in the main text refer to the third edition of his work. *Cf. McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010) (relying largely on pre-ratification evidence to conclude that "the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty").

well-established. *See Our House No. 2 v. State*, 4 Greene 172, 175 (Iowa 1853) ("[T]he revenue laws of every state in the union authorize proceedings in rem against the property alone, in the event of failure to pay taxes, and such laws are not considered unconstitutional."); *Megee v. Bierne*, 39 Pa. 50, 64 (1861) ("[T]he seizure and condemnation of the goods under the revenue laws was strictly a proceeding in rem."); *Makins Produce Co. v. Callison*, 67 Wash. 434, 439, (1912) ("A judgment . . . declaring the condemnation or forfeiture of goods seized for a breach of the excise or revenue laws, is strictly *in rem*." (quoting 2 *Black on Judgments*, § 799)).

Courts also employed *in rem* forfeitures to enforce alcohol regulations. In 1871, for example, the Massachusetts Supreme Judicial Court explained that "[t]he seizure of liquors . . . because they are kept for sale illegally, is a proceeding *in rem*," and observed that "[l]egislation of this character is not novel." *Commonwealth v. Certain Intoxicating Liquors*, 107 Mass. 396, 399 (1871). In 1890, one commentator observed that "[i]n all of the states, liquor that is intoxicating and kept for illegal sale, with the vessels containing it, is subject to seizure and condemnation." Henry Austin, *The Liquor Law in the United States* 123 (1890).

The latter half of the nineteenth century saw *in rem* forfeitures become especially important when revenue laws and alcohol regulation overlapped. Congress partially relied on excise taxes to fund the Civil War; after the war, it repealed most of the excise taxes, but kept taxes on distilled spirits and tobacco.

CRS Report R43189, *Federal Excise Taxes: An Introduction and General Analysis* 2–3 (2013). The excise taxes on spirts and tobacco continued to raise enormous sums: "In the decades after the Civil War, [they] accounted for between one-third and one-half of all federal revenue . . . [and] were the single largest source of internal revenue during this era." *Id.* at 3. The large amount of money at stake inevitably made smuggling *untaxed* alcohol highly profitable, and authorities often used *in rem* forfeitures to address the problem. *See, e.g.*, *Buchannan v. Biggs*, 2 Yeates 232, 233–34 (Pa. 1797); *Commonwealth v. Certain Intoxicating Liquors*, 107 Mass. 386, 396 (1871). One 1882 treatise, for example, justified the "rather severe" nature of tax-related *in rem* forfeitures by reference to the "difficulty of collecting government dues," a difficulty created by "the fact that in some parts of the country the distillery business has carried illicit whisky-making to that degree of refinement which is the poetry of crime. . . . 'Moonshiners' . . . are likely to afford material for many a tale by the future romancer." Waples, *supra*, § 149.

In rem forfeitures have continued into the present day, though authorities now focus on illicit drug traffickers rather than moonshiners.

2. Whether imposed by States or the federal government, *in rem* forfeitures have often produced draconian consequences for property owners. An 1819 federal statute, for example, limited the number of passengers a ship could carry to two-fifths its weight in tons, plus an additional twenty passengers; if it car-

ried more, the entire ship was liable to federal forfeiture. *See United States v. The Louisa Barbara*, 26 F. Cas. 1000, 1001 (E.D. Pa. 1833).

In the notable *The Louisa Barbara* case, the weight-limit law yielded the forfeiture of an enormously valuable, nearly four-hundred-ton vessel whose 178 passengers exceeded the limit by a single traveler. *Id.* The ship's owners pointed out that a large portion of the ship's passengers "were children, who paid nothing for their passage," and opposed forfeiture on statutory, not constitutional, grounds, arguing that the children could not "be considered or taken to be passengers within the intention of the law." *Id.* The court rejected this contention, holding that it had "no such power" to prevent the forfeiture, and that any such power rested with "that department of our government, which administers its liberality and mercy, and may forbear to execute the rigour of the law, where it is believed that its violation has been innocent or excusable." *Id.* at 1002; *see also Phile v. The Anna*, 1 Dall. 197, 207 (Pa. 1787) (upholding the *in rem* forfeiture of a ship in spite of the lack of evidence that its owners "meant to do any thing unfairly," because the law did "not speak of the knowledge of any person," and "if the policy of the Legislature seems to bear hard on the subject, we are not to judge, and determine upon its propriety").

The Louisa Barbara illustrates the harsh consequences that may result from the traditional rule that even the property of an innocent owner could be susceptible to *in rem* forfeiture. Notably, this rule is

among the most widely accepted and consistently applied in all of American law.

For instance, the Supreme Court of Pennsylvania endorsed the traditional innocent-owner rule even before the ratification of the Constitution, *id.*, and in 1818, Chief Justice Marshall, riding circuit, affirmed the rule in ordering the forfeiture of the *Little Charles* for its violation of an American embargo. *The Little Charles*, 26 F. Cas. 979, 982 (C.C.D. Va. 1818). The ship's owner objected to the introduction of the captain's report, which showed that the vessel had illegally proceeded to a foreign port, on the ground that "in a criminal case, the declarations of the captain cannot affect the owner." *Id.* at 981. Chief Justice Marshall dismissed the objection, explaining that the case was "a proceeding against the vessel, for an offence committed by the vessel, which . . . does not the less subject her to forfeiture, because it was committed without the authority, and against the will of the owner." *Id.* at 982.

In 1844, the Court reaffirmed the irrelevance of the owner's innocence to *in rem* forfeitures, holding that the owner's innocence cannot "withdraw the ship from the penalty of confiscation under the act of Congress." *The Malek Adhel*, 43 U.S. 210, 233 (1844). Considering the question settled by Chief Justice Marshall's decision in *The Little Charles*, the Court explained that the guilt of the "thing to which the forfeiture attaches" is determined "without any reference *whatsoever* to the character or conduct of the owner." *Id.* (emphasis added).

Courts did not limit the innocent-owner rule to forfeitures of ships. By 1844, courts had "familiarly applied [the doctrine] to cases of smuggling and other misconduct under our revenue laws . . . [and] other kindred cases, such as cases arising on embargo and non-intercourse acts," *id.* at 233–34, and cases soon arose applying it to *in rem* forfeitures of property on land, *see, e.g.*, *Our House No. 2*, 4 Greene at 172–73 (holding that an *in rem* forfeiture proceeding against a "dram shop" did not need to allege the owner's "knowledge of the unlawful traffic").

And in 1877, the Court enforced the doctrine against a distillery and its associated real estate, restating the rule announced in *The Little Charles* and *The Malek Adhel* and holding it irrelevant whether "the owner of the property should have knowledge that the lessee and distiller was committing fraud on the public revenue." *Dobbins' Distillery v. United States*, 96 U.S. 395, 399 (1877). Summarizing the previous century of case law, the Court observed that "[c]ases often arise where the property of the owner is forfeited . . . even when the owner is otherwise without fault . . . and it has always been held in such cases that the acts of the master and crew bind the interest of the owner of the ship, whether he be innocent or guilty." *Id.* at 401; *see also* Waples, *supra*, § 140 ("The owner may be perfectly innocent of any offense, yet his property may be guilty."). In sum, "the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense." *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974).

Courts were well aware, of course, that the innocent-owner doctrine could seem technical and "may appear to be harsh." *United States v. Two Barrels of Whisky*, 96 F. 479, 480 (4th Cir. 1899), *overruled on other grounds in part by United States v. One Saxon Auto.*, 257 F. 251 (4th Cir. 1919). But they recognized that they had no power to "refuse to carry [it] into effect, or allow [themselves] to be controlled by consideration of the supposed or real hardship of these enactments, nor open the door to opportunities of perpetual evasion." *Id.* The rule was simply "too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced." *J. W. Goldsmith, Jr., Grant Co. v. United States*, 254 U.S. 505, 511 (1921) (collecting cases); *see also One Saxon Auto.*, 257 F. at 254–55 (collecting cases). It has thus remained in force throughout the twentieth century up to the present day. *See Bennis v. Michigan*, 516 U.S. 442, 446 (1996) ("[A] long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use."); *United States v. Funds in the Amount of $100,120*, 901 F.3d 758, 768 (7th Cir. 2018).

3. Although *in rem* forfeitures have frequently arisen in a variety of contexts since the beginning of American history, prior to the late twentieth century not a single court held them limited by a state or federal Excessive Fines Clause, and the five state courts to consider the argument dismissed it. Because every State has a constitutional provision limiting the excessiveness of fines, litigants had every opportunity to

argue that Excessive Fines Clauses impose a proportionality requirement on *in rem* forfeitures, and the high stakes of forfeiture cases gave them every reason to do so. Indeed, given their acknowledgement of *in rem* forfeitures' harsh effects, *courts* had every reason to discuss the argument that the Clause might limit such forfeitures. The dearth of any such discussion in the case reports is therefore powerful evidence that the American legal tradition did not understand the Excessive Fines Clause to impose any proportionality requirement on *in rem* forfeitures.

Even before the adoption of the Fourteenth Amendment, litigants had many opportunities to raise federal Excessive Fines Clause challenges to federal *in rem* forfeitures and to raise state Excessive Fines Clause challenges to analogous state forfeitures. As demonstrated by the citations collected in the accompanying appendix, from the Revolution onward, nearly every constitution adopted by a State included an Excessive Fines Clause. And today, *every* State in the Union has a state constitutional provision prohibiting the imposition of excessive fines. *See* Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 876–77 & n.177 (2013) (explaining that forty-seven States have clauses prohibiting "excessive fines" and that the remaining three States have clauses either requiring proportionality for penalties or prohibiting excessive punishments generally). Courts regularly enforced state Excessive Fines Clauses—against *in personam* penalties—through the nineteenth and into the twentieth

century.[3] And, as the cases discussed above demonstrate, surely many *in rem* forfeitures arguably imposed "disproportionate" losses on owners.

The 1920 decision in *House and Lot v. State* was the first to suggest that the federal Excessive Fines Clause or a state equivalent imposes a proportionality limitation on *in rem* forfeitures. 204 Ala. 108 (1920). The case involved a challenge to a state law providing for the *in rem* forfeiture of "all property used in connection with [a distillery], together with the buildings and lots or parcels of ground constituting the premises." *Id.* at 109. The Alabama Supreme Court rejected the argument that any proportionality requirement applied to the *in rem* forfeiture, holding that Magna Carta's prohibition on disproportionate amercements and the State's constitutional prohibition on "excessive fines" had "*nothing to do with the case, for they relate to legislative punishment,*"

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[3] *See, e.g., Commonwealth v. Hitchings*, 71 Mass. 482, 486 (1855); *Blydenburgh v. Miles*, 39 Conn. 484, 490 (1872); *Wright v. Commonwealth*, 77 Pa. 470 (1875) (per curiam); *State v. Driver*, 78 N.C. 423, 429 (1878); *Conley v. State*, 85 Ga. 348 (Ga. 1890); *Southern Express Co. v. Commonwealth ex rel. Walker*, 92 Va. 59 (1895); *Ex parte Keeler*, 45 S.C. 537 (1896); *People v. Crotty*, 22 A.D. 77, 79 (N.Y. App. Div. 1897); *State v. Foster*, 22 R.I. 163 (1900); *State v. Griffin*, 84 N.J.L. 429, 432 (N.J. 1913); *Apple v. State*, 190 Md. 661, 668 (Md. Ct. App. 1948); *Peters v. University of N.H.*, 112 N.H. 120, 121 (1972). Notably, state Excessive Fines Clauses were not applied to *in rem* forfeitures until after this Court's decision in *Austin*, if ever. *See, e.g., In re King Properties*, 535 Pa. 321, 330–31 (1993); *State v. Williams*, 286 N.J. Super. 507 (N.J. Super. Ct. Law Div. 1995); *Evans v. State*, 214 Ga. App. 844, 846 (1994); *Aravanis v. Somerset*, 339 Md. 644, 664–65 (1995); *Medlock v. One 1985 Jeep Cherokee*, 322 S.C. 127, 132 (1996).

whereas the statute "is justified on the ground that it is a provision for the abatement of nuisances." *Id.*

No contemporaneous decisions disagreed with *House and Lot*. The first edition of the American Jurisprudence volume on forfeitures cited *House and Lot* for the proposition that "[s]tatutes which provide for the forfeiture of property used in connection with the violation of certain laws do not violate the constitutional provisions against cruel and unusual punishment." Am. Jur. 1 Forfeitures and Penalties § 3 (1939). And four state courts later came to the same conclusion, holding that their respective state Excessive Fines Clauses do not apply to *in rem* forfeitures. *See State v. Thornson*, 170 Minn. 349, 352–53 (1927) (citing and agreeing with *House and Lot*); *Moore v. Commonwealth*, 293 Ky. 55 (1943) (same); *Commonwealth v. One 1970, 2 Dr. H. T. Lincoln Auto.*, 212 Va. 597, 599 (1972) ("[The Constitution prohibits] the imposition of excessive bail or fines or infliction of unusual punishment. The forfeiture of offending property does not fall within any of these categories."); *Henry v. Alquist*, 127 A.D.2d 60, 65 (N.Y. App. Div. 1987) ("To the extent that the trial court's determination may be interpreted as a holding that the forfeiture . . . would violate the State and Federal constitutional proscriptions against cruel and unusual punishment . . . we find it to be in error.").

Beyond these state-court decisions rejecting application of state Excessive Fines Clauses to *in rem* forfeitures, no federal court even *mentioned* the possibility that the federal Excessive Fines Clause might im-

pose a proportionality requirement on *in rem* forfeitures until the Ninth Circuit's 1988 decision in *United States v. Tax Lot 1500*, 861 F.2d 232 (9th Cir. 1988), issued only five years before *Austin v. United States*, 509 U.S. 602 (1993). And the Ninth Circuit observed that it could find "no case holding the eighth amendment applicable to civil forfeiture actions." 861 F.2d at 233.[4] It therefore rejected the argument that the Excessive Fines Clause imposes a proportionality requirement against *in rem* forfeitures. *Id.* at 235.

Shortly after the Ninth Circuit's decision in *Tax Lot 1500*, the Third and Fourth Circuits also held that the Eighth Amendment does not apply to *in rem* forfeitures. *See United States v. 107.9 Acre Parcel of Land*, 898 F.3d 396, 400–01 (3rd Cir. 1990); *United States v. Santoro*, 866 F.2d 1538, 1543–44 (4th Cir. 1989). Around the same time, however, three separate concurrences suggested, without any explanation, that the Excessive Fines Clause may impose some proportionality requirement on *in rem* forfeitures. *See United States v. 3639-2nd St., N.E.*, 869

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[4] The Second Circuit's decision in *United States v. Huber*, 603 F.2d 387 (2d Cir. 1979), comes close to making this suggestion, but it rejected an Eighth Amendment challenge to an *in personam* forfeiture. *Id.* at 396–97. In doing so, it observed that *in rem* forfeitures "have been upheld even where . . . the effect is to deprive an owner of property where that owner is not the person guilty," and that "[a]t least for this purpose, there is no substantial difference between an *in rem* proceeding and a forfeiture proceeding brought directly against the owner." *Id.* Far from suggesting that the Eighth Amendment can invalidate *in rem* forfeitures, this reasoning points to the opposite conclusion. *Accord United States v. Grande*, 620 F.2d 1026 (4th Cir. 1980); *United States v. Busher*, 817 F.2d 1409 (9th Cir. 1987).

F.2d 1093, 1098 (8th Cir. 1989) (Arnold, J., concurring); *United States v. On Leong Chinese Merchants Ass'n Bldg.*, 918 F.2d 1289, 1298–99 (7th Cir. 1990) (Cudahy, J., concurring); *United States v. 916 Douglas Ave.*, 903 F.2d 490, 495 (7th Cir. 1990) (Flaum, J., concurring).

Finally, in 1992 the Second Circuit became the first court to accept the argument the Ninth Circuit had rejected in *Tax Lot 1500*, applying the Excessive Fines Clause against an *in rem* forfeiture of a condominium that had been used to traffic a small amount of drugs. *United States v. 38 Whalers Cove Drive*, 954 F.2d 29, 32 (2d Cir. 1992); *see also United States v. Premises Known as RR No. 1 Box 224*, 14 F.3d 864, 873 (3d Cir. 1994) ("Prior to *Austin*, the United States Court of Appeals for the Second Circuit was the only court of appeals to hold that the Eighth Amendment potentially limited civil forfeitures."). The Second Circuit ultimately rejected the Excessive Fines Clause challenge, however, concluding that the forfeiture was not "'grossly disproportionate' to the crime committed." *38 Whalers Cove Drive*, 954 F.2d at 38 (quoting *Solem v. Helm*, 463 U.S. 277, 290–92 (1983)). Two months later, the Eighth Circuit "adopt[ed] the Ninth Circuit's analysis" and held that the Excessive Fines Clause does *not* apply to *in rem* forfeitures, *United States v. 508 Depot St.*, 964 F.2d 814, 817 (8th Cir. 1992)—a holding this Court then reversed in *Austin*.

4. That no court applied a state or federal Excessive Fines Clause to *in rem* forfeitures until *1992*—more than two hundred years after the Constitution's ratification—strongly implies that no one understood

the Excessive Fines Clause to impose a proportionality requirement on these forfeitures. And that owners of forfeited property raised *other* constitutional challenges against *in rem* forfeitures—albeit unsuccessfully—further bolsters the power of this implication. Bishop's 1865 treatise observed that while it is possible that *in rem* forfeitures "may be restrained by the constitution of the State . . . our constitutions have few if any direct restrictions in the matter; those which exist resulting from provisions introduced with a primary regard to other objects, if indeed any exist." Bishop, *supra*, § 707.

The very existence of other constitutional challenges to *in rem* forfeitures indicates that the absence of Excessive Fines Clause objections resulted from the widespread understanding that the Clause simply did not apply (rather than lack of opportunities). Litigants occasionally argued, for example, that *in rem* proceedings violated the owner's right to a jury trial (objections that courts generally rejected). *See, e.g.*, *United States v. La Vengeance*, 3 U.S. 297, 301, (1796) ("It is a process of the nature of a libel *in rem*; and does not, in any degree, touch the person of the offender. In this view of the subject, it follows, of course, that no jury was necessary."); *Lincoln v. Smith*, 27 Vt. 328, 362–63 (1855) (rejecting jury-trial challenge to *in rem* forfeiture proceedings); *Jones v. Root*, 72 Mass. 435, 438–39 (1856) (same); *Dowda v. State*, 203 Ala. 441, 443 (1919) (same).

Similarly, property owners occasionally subjected the innocent-owner doctrine to due process objections (again, unsuccessfully). For example, a claimant

raised such a challenge against a mid-nineteenth century Iowa law that provided for the *in rem* forfeiture of "dram shops," without requiring proof of the owner's "knowledge of the unlawful traffic." *Our House No. 2*, 4 Greene at 172–73. Rejecting the challenge, the Iowa Supreme Court explained that "[u]nder our federal, as well as under state constitutions, it is not uncommon to pass laws declaring articles to be forfeited, when they are used for illegal or criminal purposes . . . Still the constitutionality of those acts *have never been questioned*." *Id.* at 174–75 (emphasis added). The constitutionality of *in rem* proceedings had been "conclusively settled by the highest judicial tribunal in our country . . . [T]he revenue laws of every state in the union authorize proceedings *in rem* against the property alone, in the event of failure to pay taxes, and such laws are not considered unconstitutional." *Id.* at 175. The Iowa Supreme Court concluded, "[t]his proceeding . . . does not deprive a person of his property without due process of law." *Id.*

Subsequent decisions reiterated this view. *See, e.g.*, *Van Oster v. Kansas*, 272 U.S. 465, 468 (1926) ("It has long been settled that statutory forfeitures of property intrusted by the innocent owner or lienor to another who uses it in violation of the revenue laws of the United States is not a violation of the due process clause of the Fifth Amendment."); *Logan v. United States*, 260 F. 746, 748–49 (5th Cir. 1919) ("The long history of forfeitures in this country, for violation of internal revenue and customs laws, of property, regardless of ownership, whether innocent or guilty, repels the idea that such forfeitures conflict with the owner's right to due process of law.").

Not only case reports, but also the Congressional record, demonstrate the nineteenth century understanding that the Excessive Fines Clause does not apply to *in rem* forfeitures. In the debate over the Confiscation Act of 1862, which authorized *in rem* forfeiture of rebel-owned property, critics argued that the Act violated "all of the provisions of the Fifth, Sixth, and Seventh Amendments," but the record of the debate contains few mentions of "the excessive-fines provision of the Eighth." Christopher Green, *Our Bipartisan Due Process Clause*, Geo. Mason L. Rev. (Forthcoming) 13, https://ssrn.com/abstract=3249845; *see also id.* at 46 n.248 (noting that "[a] couple of congressmen made passing references to the Excessive Fines Clause in their complaints about confiscation proposals in 1862"). Most of the Act's critics focused on due process objections to the Act. And among the criticisms that claimed the Act was too harsh, the vast majority were explicitly based on policy or morality, *not* the Constitution. *Id.* at 46–50. The relative absence of Excessive Fines Clause arguments implies that members of Congress simply did not think the Clause relevant to the Confiscation Act's *in rem* forfeitures.

Amidst other constitutional challenges to *in rem* forfeitures, the absence of any historical application of a proportionality requirement suggests that the American legal order did not understand the Excessive Fines Clause to establish one. If such an understanding existed, surely *some* litigant would have raised it and some court would have at least mentioned it.

5. Inferring contextual limits on constitutional rights from a longstanding and uninterrupted historical practice has a long pedigree in constitutional interpretation. "If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 17 (1991) (quoting *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730 (1988)); *see also Origet v. Hedden*, 155 U.S. 228, 238 (1894) (holding that the practice of charging administrative officials with determining dutiable value of imported articles was "open to no constitutional objection" because it dated to "the earliest history of the government."); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 327–328 (1936) (observing that evidence of a longstanding legislative practice "goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice"). Indeed, in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, the Court refused to subject a punitive-damages award to scrutiny under the Excessive Fines Clause because the practice of awarding such damages "was well recognized at the time the Framers produced the Eighth Amendment." 492 U.S. 257, 274 (1989).

The historical absence of any judicial recognition of the constitutional right Timbs claims is especially powerful here because—unlike, for example, the constitutional prohibition on laws requiring racial segregation—no political considerations would lead litigants or judges systematically to ignore the right Timbs asserts. Continued enforcement of racial segre-

gation even after adoption of the Fourteenth Amendment does not imply that ratifiers understood racial segregation to be constitutional; fear of negative political repercussions and even violent retaliation easily explain why courts refused to invalidate it. Andrew E. Taslitz, *Hate Crimes, Free Speech, and the Contract of Mutual Indifference*, 80 B.U. L. Rev. 1283, 1385–86 (2000). Here, however, no similar collateral concerns would explain courts' failure to impose a proportionality requirement on *in rem* forfeitures, which could be imposed on anyone, not just members of a politically disfavored group. Besides, political considerations did not prevent courts from imposing a proportionality requirement on *in personam* penalties. *See supra*, n.4. And unlike the numerous constitutional arguments Radical Republicans made against racial segregation, *see, e.g.*, Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947, 984–1005 (1995), the second half of the nineteenth century saw virtually no lawyer, scholar, or court argue that the Excessive Fines Clause applies to *in rem* forfeitures.

At bottom, Timbs's argument for incorporation maintains that the forfeiture of his Rover violates the Due Process Clause. But the Court has held that "[i]f the government chooses to follow a historically approved procedure, it necessarily *provides* due process." *Pac. Mut. Life Ins. Co.*, 499 U.S. at 31.

B. The historical rationale for *in rem* forfeitures explains why they were not understood to be subject to a proportionality requirement

The long-established understanding of *in rem* forfeitures explains why the Excessive Fines Clause does not apply here. As multiple nineteenth-century treatises explicated, *in rem* forfeitures are not penalties, and the Excessive Fines Clause applies only to a "*punishment* for some offense," *Austin*, 509 U.S. at 610 (quoting *Browning-Ferris*, 492 U.S. at 265). Practical considerations also explain why *in rem* forfeitures would not have been understood to be subject to a proportionality requirement: The doctrine establishing the irrelevance of the property owner's innocence is flatly inconsistent with such a requirement, and *in rem* forfeitures by definition will never result in an individual's incarceration, which means they do not implicate the traditional concern behind the Excessive Fines Clause. The Court cannot reconcile the theory and practice of *in rem* forfeitures with any proportionality test.

1. Because courts have long understood *in rem* proceedings as actions against *property*, the American legal tradition has not considered *in rem* forfeitures—unlike *in personam* fines or forfeitures—as "punishments" to which the Excessive Fines Clause applies.

The distinction between *in rem* forfeitures and *in personam* fines antedates even the colonies' separation from Great Britain. A treatise by Sir Jeffrey Gilbert, renowned legal scholar and Lord Chief Baron of

the Court of Exchequer, explains, for example, that "the *Forfeiture* was appointed *in rem, and* likewise a Penalty was laid upon the Person transgressing the Law." Sir Jeffrey Gilbert, *A Treatise on the Court of Exchequer* 181 (1758) (last emphasis added; spelling modernized). Courts enforced the forfeiture in an *in rem* proceeding and enforced the "Penalty" via a "Personal Information," and owners often avoided the "Penalty" by declining to contest the forfeiture. *Id.*

Just a few decades after the Constitution's ratification, the Court issued what remains the most-cited decision regarding the distinction between *in rem* and *in personam* proceedings, *The Palmyra*, 12 Wheat. 1 (1827). Writing for the Court, Justice Story explained that while *in personam* forfeitures could not be imposed without a judgment of conviction, "this doctrine never was applied to seizures and forfeitures, created by statute, *in rem*." *Id.* at 14. A judgment of conviction is unnecessary for an *in rem* forfeiture because "[t]he thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing." *Id.* Justice Story observed that there are "[m]any cases" featuring an *in rem* forfeiture but no *in personam* penalty and "[m]any cases" where both arise. *Id.* But either way "the proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam*." *Id.* at 15; *see also Talmage & Van Pelt v. Fire Dep't of New York*, 24 Wend. 235, 236 (N.Y. Sup. Ct. 1840) (explaining that a New York law imposing fines and forfeitures for storing too much gunpowder imposed "two forfeitures . . . [t]he

pecuniary penalty must, of course, be recovered by action; but the mode of asserting the other forfeiture, is by seizing the property and storing it in a magazine").

Reflecting the consensus in the case law, treatises written in the years leading up to the Civil War routinely emphasized the distinction between *in rem* and *in personam* forfeitures. Erastus Benedict's antebellum admiralty treatise, for example, explained that "[s]uits and proceedings in Admiralty are divided into two great classes—suits and proceedings *in rem*, and suits and proceedings *in personam*." Erastus Benedict, *The American Admiralty* § 359 (1850). *In rem* proceedings "are against a thing itself, and the relief sought is confined to the thing itself," while *in personam* proceedings "are against a person, and the relief is sought against him without reference to any specific property or thing." *Id.* The former sort of proceedings are never criminal, while the latter can be. *Id.* § 360.

Widely respected treatises published during and shortly after the Civil War—close in time to the ratification of the Fourteenth Amendment—reflected the conceptual distinction. Judge Conkling, whose treatise was "a work long used with approbation by the profession," *Gaines v. Fuentes*, 92 U.S. 10, 24 (1875) (Bradley, J., dissenting), underscored that an *in rem* proceeding "is strictly a prosecution against a *thing*, which has been seized as forfeited . . . on account of some imputed illegal act in regard to it. No inquiry is instituted . . . concerning [its] ownership," Alfred Conkling, *Treatise on the Organization, Jurisdiction,*

and Practice of the Courts of the United States 540–41 (1864).

Moreover, Bishop's 1865 treatise—"prominent" among the profession, *Austin*, 509 U.S. at 626—similarly explains that while an *in personam* forfeiture is "inflicted as a punishment for crime," Bishop, *supra*, § 701, an *in rem* forfeiture "is neither a punishment for crime . . . nor a damage awarded for a civil injury," *id.* § 702. An *in rem* forfeiture thus "differs from a mulct, or fine" as well as "those forfeitures which in the English law attend corruption of blood." *Id.* § 697. An *in rem* forfeiture proceeds upon its own logic: "Law is the creator of property; and the province of a creator is to prescribe to the thing created the conditions of its being. When the conditions are violated, the property falls." *Id.* § 696.

The distinction between *in rem* and *in personam* proceedings remains in force today, as the Court has consistently reaffirmed. *See, e.g., United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 363 (1984) ("In contrast to the *in personam* nature of criminal actions, actions *in rem* have traditionally been viewed as civil proceedings, with jurisdiction dependent upon seizure of a physical object."); *United States v. Ursery*, 518 U.S. 267, 278 (1996) ("*In rem* civil forfeiture is a remedial civil sanction, distinct from potentially punitive *in personam* civil penalties such as fines."); 4A Charles Alan Wright & Arthur Miller, *Fed. Prac. & Proc. Civ.* § 1070 (4th ed.) ("[I]t still is important to distinguish actions based on property from those based on personal jurisdiction because of their different legal consequences.").

In rem forfeitures are not punishments because "the only effect is the immediate change of *status*: that is, the property changes owners." Waples, *supra*, § 140. Accordingly, courts and commentators have understood *in rem* forfeitures not to be subject to the Excessive Fines Clause, which has always applied only to "punishments." "[A]t the time of the drafting and ratification of the Amendment, the word 'fine' was understood to mean a payment to a sovereign as *punishment* for some offense." *Browning-Ferris*, 492 U.S. at 265 (emphasis added).

2. In addition to this conceptual problem, on a practical level there is no way to reconcile a proportionality requirement with the traditional practice of *in rem* forfeitures.

First, courts have long imposed *in rem* forfeitures against the property of owners who have no awareness of or involvement in the activity that justifies the forfeitures. Subjecting such forfeitures to a "proportionality" analysis is inconsistent with the innocent-owner rule: Leasing a yacht to an individual who later uses it to transport marijuana—even when the decision is taken without knowledge of the lessee's intended use—is plainly not "proportionate" with punishing the owner with a loss equivalent to the value of the yacht. *See Calero-Toledo*, 416 U.S. at 665–68. The innocent-owner rule is justified by the long-held view that the forfeiture is not punishment at all. "If the constitution allows *in rem* forfeiture to be visited upon innocent owners who were imprudent in choosing bailees, the constitution hardly requires proportional-

ity review of forfeitures imposed on the guilty who assumed the risk of forfeiture." *Tax Lot 1500*, 861 F.2d at 234; *accord 508 Depot St.*, 964 F.2d at 817.

Second, unlike *in personam* penalties, *in rem* forfeitures *cannot* deprive individuals of their liberty, and for this reason they are as a practical matter unrelated to the central original concern of the Excessive Fines Clause, which was to prevent judges from incarcerating individuals on the basis of unpayable discretionary fines. Similar provisions of Magna Carta and the 1689 English Bill of Rights inspired the Excessive Fines Clause, and the arguments made during a significant early case involving these provisions, *The Case of William Earl of Devonshire*, 11 How. St. Tr. 1353 (Parl. 1689), indicate that the provisions' "critical purpose" was to prevent discretionary, unpayable fines from becoming a tool for incarcerating political enemies. Eighth Amendment Scholars Amicus Br. 20. "'[I]f the Judges may commit the Party to Prison till the Fine be paid, and withal set so great a Fine as is impossible for the Party to pay into Court, then it will depend upon the Judges pleasure, whether he shall ever have his *Liberty*.'" *Id.* (quoting *The Works of the Right Honourable Henry late L. Delamer[e], and Earl of Warrington* 576 (1694)); *see also Browning-Ferris*, 492 U.S. at 267 (noting that the Excessive Fines Clause in the 1689 English Bill of Rights was motivated by the experience of "some opponents of the King [who] were forced to remain in prison because they could not pay the huge monetary penalties that had been assessed").

Unlike *in personam* fines, an *in rem* forfeiture by definition targets property *already* seized. An *in rem* proceeding therefore does not permit the government to obtain additional exactions. If the property's owner chooses not to appear in the proceeding, the worst possible consequence is a judgment of forfeiture. *See, e.g.*, Gilbert, *supra*, at 180; Ind. Code § 34-24-1-3(e). Because *in rem* forfeitures do not implicate the core concern of the Excessive Fines Clause, it is unsurprising no one understood the Clause to apply to them.

III. History Establishes That Either the Excessive Fines Clause Does Not Apply to *In Rem* Forfeitures or the Fourteenth Amendment Does Not Incorporate the Clause Against the States

The historical evidence thus establishes that from before the American Revolution, through the Civil War and the ratification of the Fourteenth Amendment, and up to the end of the twentieth century, the American legal tradition did *not* understand *in rem* forfeitures to be subject to any proportionality requirement. Only two possible interpretations of the Excessive Fines Clause and the Fourteenth Amendment comport with this longstanding and widespread understanding. The more compelling interpretation is that the Excessive Fines Clause does *not* apply to *in rem* forfeitures: This interpretation fully explains the history and the Court need not extend *Austin* so as to interfere with it. But if the Court were to conclude that *Austin already* requires applying the Excessive Fines Clause to *in rem* forfeitures, the history recounted above precludes interpreting the Fourteenth

Amendment to incorporate the Excessive Fines Clause. Either way, the historical evidence squarely forecloses any constitutional interpretation requiring proportionality for the *in rem* forfeiture Timbs challenges here.

A. The better interpretation reads the Excessive Fines Clause not to apply to *in rem* forfeitures

The Court can best resolve this case by interpreting the Excessive Fines Clause not to apply to *in rem* forfeitures. This interpretation would reconcile all of the relevant historical evidence, including the evidence Timbs identifies, and would be consistent with the Court's current Excessive Fines Clause jurisprudence. Although the Court's decision in *Austin* applied the Excessive Fines Clause to *federal in rem* forfeitures, *Austin* said nothing about *state* forfeitures; because a proportionality requirement applied to *in rem* forfeitures is neither "fundamental to" nor "deeply rooted in" America's legal tradition, there is no reason to expand *Austin*'s holding to States. *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010). And regardless, the Court's subsequent decisions have fatally undermined the reasoning on which *Austin* relied.

1. From the very beginning, every State and the federal government has imposed *in rem* forfeitures on the instrumentalities of crimes, even while state or federal constitutional provisions prohibiting excessive fines have restrained virtually all of these gov-

ernments. *In rem* forfeitures were often harsh, and litigants sometimes challenged them on constitutional grounds. Yet—even after the Fourteenth Amendment's ratification—*no* court applied a state or federal Excessive Fines Clause to *in rem* forfeitures until the late twentieth century. And the five earlier state-court decisions to address the question specifically *rejected* application of a constitutional prohibition on excessive fines to *in rem* forfeitures. *House and Lot v. State*, 204 Ala. 108 (1920); *State v. Thornson*, 170 Minn. 349, 352–53 (1927); *Moore v. Commonwealth*, 293 Ky. 55 (1943); *Commonwealth v. One 1970, 2 Dr. H. T. Lincoln Auto.*, 212 Va. 597, 599 (1972); *Henry v. Alquist*, 127 A.D.2d 60, 65 (N.Y. App. Div. 1987).

The obvious explanation for the historical silence surrounding Excessive Fines Clause limitations on *in rem* forfeitures is that America's lawyers and judges have not understood the federal Excessive Fines Clause—or its state analogues—to apply to these forfeitures. The Clause applies only to punishments, and—as decades of cases and treatises have explained—*in rem* forfeitures are *not* punishments.

Notably, this interpretation not only explains the lack of any Excessive Fines Clause objection to *in rem* forfeitures, but it also reconciles all of the historical evidence Timbs has marshalled. Again, the Excessive Fines Clause has antecedents in Magna Carta and the 1689 English Bill of Rights, and every state constitution includes some version of its proportionality principle. *See* Pet. Br. 10–19. Yet courts have historically enforced state and federal Excessive Fines Clauses only against *in personam* penalties. *See supra*, n.3.

Understanding the Excessive Fines Clause to apply only to *in personam* penalties explains that historical practice.

2. The Court's decision in *Austin* does not require the Court to interpret the Excessive Fines Clause to apply to state *in rem* forfeitures. In *Austin*, the Court "limited [its] review to the question 'whether the Excessive Fines Clause of the Eighth Amendment applies to forfeitures of property under 21 U.S.C. §§ 881(a)(4) and (a)(7)," two provisions of a *federal* forfeiture statute. *United States v. Ursery*, 518 U.S. 267, 281 (1996). *Austin* held only that the Excessive Fines Clause applies to *in rem* forfeitures under these two specific provisions. *Austin v. United States*, 509 U.S. 602, 604–05 & n.1 (1993). The Court need not—and plainly, in light of the historical record explored above, *should* not—extend this holding to *state in rem* forfeitures.

More important, the Court's subsequent decisions have undermined *Austin*'s reasoning. *Austin* began from the presumption that "[t]he Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" *Id.* at 609–10 (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. U.S. 257, 265 (1989)). It thus framed the question as whether a forfeiture under the federal statutes at issue "is *punishment*." *Id.* at 610 (emphasis added). And in answering this question, the Court relied heavily on its decision in *United States v. Halper*, 490 U.S.

435 (1989), which addressed when the Double Jeopardy Clause prohibits a second punishment for the same offense.

Austin quotes *Halper*'s definition of "punishment," the term on which *Austin*'s entire analysis turns: "[A] civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is *punishment*, as we have come to understand the term." *Austin*, 509 U.S. at 621 (quoting *Halper*, 490 U.S. at 448) (second emphasis added); *see also id.* at 610 (same); *United States v. Premises Known as RR No. 1 Box 224*, 14 F.3d 864, 873 (3d Cir. 1994) ("In *Austin*, the Supreme Court relied on *United States v. Halper* and *Browning Ferris Industries v. Kelco Disposal, Inc.* in reaching its conclusion that the civil forfeiture statutes constitute a 'punishment.'" (citations omitted)). *Austin* held that the challenged forfeitures qualified as punishment—and therefore were subject to the Excessive Fines Clause—because "forfeiture statutes historically have been understood as serving not simply remedial goals but also those of punishment and deterrence." *Austin*, 509 U.S. at 622 n.14.

Austin thus made *Halper*'s definition of "punishment" the foundation of its conclusion, but the Court soon demolished this foundation. Three years after *Austin*, the Court explicitly "limited [*Halper*] to the context of civil penalties," *Ursery*, 518 U.S. at 282, and held that a *civil forfeiture* proceeding results in a "punishment" for the purposes of the Double Jeopardy Clause only if it is "so punitive in fact as to persuade us that [it] may not legitimately be viewed as civil in

nature," *id.* at 288 (internal quotation marks and citation omitted).

Ursery refused to apply *Halper*'s definition of punishment to *in rem* forfeitures because it recognized that the Court has long drawn "a sharp distinction between *in rem* civil forfeitures and *in personam* civil fines: Though the latter could, in some circumstances, be punitive, the former could not." *Id.* at 275. *Ursery* explained that it is nonsensical to apply any sort of proportionality test to *in rem* forfeitures: It makes no sense to "compare the harm suffered by the Government against the size of the penalty imposed" because *in rem* forfeitures, "in contrast to civil penalties, are designed to do more than simply compensate the Government . . . Though it may be possible to quantify the value of the property forfeited, it is virtually impossible to quantify, even approximately, the nonpunitive purposes served by a particular civil forfeiture." *Id.* at 284.

In explaining why *Austin* did not overrule *Halper*, *Ursery* suggested that *Austin* and *Halper* were unconnected, *id.* at 286, which, alas, completely ignores *Austin*'s reasoning. *Ursery* correctly observed that *Halper* used a "case-by-case approach," while *Austin* employed "a categorical approach" whereby the Excessive Fines Clause would apply depending on the statutory authority for, rather than factual circumstances of, the forfeiture. *Id.* at 287; *see also Austin*, 509 U.S. at 622 n.14. But the difference in the way the two decisions *applied* the definition of "punishment" does not decouple their *rationales*. *Austin* quoted *Halper* four times to support the expansive definition

of "punishment" it employed to subject forfeitures under two federal forfeiture provisions to the Excessive Fines Clause; *Austin* held that these forfeiture provisions imposed punishments because they "'cannot fairly be said *solely* to serve a remedial purpose,'" even if they "serve *some* remedial purpose." *Id.* 621 (quoting *Halper*, 490 U.S. at 448).

The Court's criticisms of *Halper* culminated in *Hudson v. United States*, where it directly overruled *Halper*, concluding that the decision's "test for determining whether a particular sanction is 'punitive,' and thus subject to the strictures of the Double Jeopardy Clause, has proved unworkable." 522 U.S. 93, 102 (1997). The Double Jeopardy Clause thus no longer applies to "punitive" civil penalties but "protects only against the imposition of multiple criminal punishments for the same offense." *Id.* at 99.

The Court's Double Jeopardy Clause opinions in *Ursery* and *Hudson* undermine *Austin*'s reliance on *Halper*, and the decision in *United States v. Bajakajian*, 524 U.S. 321 (1998), vitiates any remaining support for *Austin*'s reasoning. In *Bajakajian*, the Court confronted an Excessive Fines Clause challenge to an *in personam* forfeiture imposed as part of a criminal sentence for a federal currency-reporting violation. *Id.* at 325. Because the forfeiture was "imposed at the culmination of a criminal proceeding and require[d] conviction of an underlying felony," the Court had "little trouble concluding that . . . [it] constitute[d] punishment." *Id.* at 328. Notably, the Court distinguished this *in personam* forfeiture from "traditional

civil *in rem* forfeitures," which it said "were historically considered nonpunitive." *Id.* at 330.

The Court surveyed its early decisions involving *in rem* forfeitures and observed that each recognized that "[t]he theory behind such forfeitures was the fiction that the action was directed against 'guilty property,' rather than against the offender himself," which implied that "the owner of forfeited property could be entirely innocent of any crime." *Id.* Accordingly, "[t]raditional *in rem* forfeitures were thus not considered punishment against the individual for an offense." *Id.* at 331. And "[b]ecause they were viewed as nonpunitive, *such forfeitures traditionally were considered to occupy a place outside the domain of the Excessive Fines Clause.*" *Id.* (emphasis added) (observing that in *Usery* the Court "[r]ecogniz[ed] the nonpunitive character of such proceedings").

The Court's statement in *Bajakajian* that *in rem* forfeitures historically have not constituted punishments unequivocally contradicts *Austin*'s assertion that "forfeiture proceedings historically have been understood as imposing punishment despite their *in rem* nature." 509 U.S. at 616 n.9.

3. *Austin*'s unsupported statement that *in rem* forfeitures impose punishment is no reason to ignore the historical evidence that the Excessive Fines Clause has nothing to do with *in rem* forfeitures.

Austin first claimed that eighteenth-century dictionaries "confirm that 'fine' was understood to in-

clude 'forfeiture' and vice versa." *Id.* at 614 n.7. Although "forfeiture" and "fine" were *sometimes* used interchangeably, *see* Eighth Amendment Scholars Amicus Br. 32–33, the word "fine" was also used in a "restricted and technical sense" to mean "only those pecuniary punishments of offences, which are inflicted by sentence of a court in the exercise of criminal jurisdiction," *Hanscomb v. Russell*, 77 Mass. 373, 374–75 (1858); *see also* Eighth Amendment Scholars Amicus Br. 33 (noting *Hanscomb*).

More fundamentally, treating "fine" and "forfeiture" as synonyms ignores the crucial distinction between *in personam* and *in rem* forfeitures. Bishop's 1865 treatise clarified that an *in rem* forfeiture "differs from some other things in the law, known by the same name," such as "a mulct, or fine, whereby, under sentence of the court . . . a specific article of property . . . is transferred to the government." Bishop, *supra*, § 697; *see also id.* § 701 ("[F]orfeiture is sometimes inflicted as a punishment for crime," and this forfeiture "differ[s] in nature from the forfeiture discussed in this chapter [entitled 'where the thing, as distinguished from its owner, is in the wrong'].").
Bishop notes that a later section of his treatise mentions these other fines. *Id.* § 701. This later section in turn explains that statutes sometimes require the forfeiture of "particular articles of property," and "such forfeitures . . . rest on the same reasons as fines." *Id.* § 723. It also reiterates the distinction between *in personam* forfeitures and *in rem* forfeitures: The latter "restrain men from making injurious uses of their property," and are "not to be regarded as punishments." *Id.*

Austin also suggested that *in rem* forfeitures are punishments because the Court has "expressly reserved the question whether [an *in rem* forfeiture could] forfeit the property of a truly innocent owner." 509 U.S. at 617. *Austin* inferred that if *in rem* forfeitures "had been understood not to punish the owner, there would have been no reason to reserve the case of a truly innocent owner . . . it is only on the assumption that forfeiture serves in part to punish that the Court's past reservation of that question makes sense." *Id.*

Austin's inference is mistaken. An *in rem* forfeiture is not "punishment," but it is nevertheless a "depriv[ation] . . . of property"; when that deprivation occurs pursuant to a statute that declares property guilty *which is in fact innocent*, the deprivation occurs without "due process of law." U.S. Const. amend. XIV. The *due process* limitation on *in rem* forfeitures is the reason courts have sometimes suggested that the innocent-owner rule may not apply if the owner's property was stolen. *See, e.g.*, *Peisch v. Ware*, 8 U.S. 347, 365 (1808) ("[T]he law is not understood to forfeit the property of owners or consignees, on account of the misconduct of mere strangers, over whom such owners or consignees could have no controul."); *Commonwealth v. Certain Motor Vehicle*, 261 Mass. 504, 509–10 (1928) (holding that the *in rem* forfeiture of a motor vehicle containing liquor intended for sale was not a "taking of property without due process of law in violation of the Fourteenth Amendment," but declining to "pass upon the further question . . . whether the right to forfeit extends to property the actual control

of which the true owner has never intentionally relinquished to another, that is, to property taken from him by a thief").

As one nineteenth-century treatise explained, while spirits produced by an illicit distillery in Maine can be made forfeitable, the Due Process Clause would prohibit a legislature from imposing an *in rem* forfeiture on spirits the illicit distiller imported into New Orleans: The imported spirits would not be guilty "either in fact or under the fiction known to legal science." Waples, *supra*, § 156. There would be "no *jus in re*," and "[t]o take such property by proceedings *in rem* would not be to take it by 'due process of law.'" *Id.*

Importantly, this due process limitation was *not* related to a concern with *proportionality* between the value of the forfeited property and the egregiousness of the crime. The same treatise endorsed clearly disproportionate forfeitures. It observed, for example, that the federal government had regulated distilleries' bookkeeping and had provided for the *in rem* forfeiture of the distillery and land it occupied if the distillery's books did not comply with these requirements, even by the "omission of the distiller to enter some of the minor matters required—the quantity of ice—the weight of a certain washtub." *Id.* § 162. The treatise explained that the *in rem* forfeiture in that circumstance was constitutional because "Congress cannot constitutionally provide that property shall be condemned as guilty by proceedings *in rem* where there is no offense to be imputed; but *it can provide*

for such condemnations for offenses resting upon apparently unimportant facts." Id. (emphasis added).

Justice Scalia was thus correct to suggest in *Austin* that the Constitution prevents the government from taking, on an *in rem* theory, "property that cannot properly be regarded as an instrumentality of the offense." *Austin*, 509 U.S. at 627–28 (Scalia, J., concurring). He located this constitutional limitation, however, in the wrong provision. Cases and commentators have recognized that this requirement, that property subject to *in rem* forfeiture be connected to the violation of the law, is an implication of the Due Process Clause, not the Excessive Fines Clause. *See Certain Motor Vehicle*, 261 Mass. at 509–10; Waples, *supra*, § 156.

Moreover, the Excessive Fines Clause, whose "touchstone . . . is the principle of proportionality," *Bajakajian*, 524 U.S. at 334, cannot justify this requirement. Whether a sufficient link exists between a particular property and a particular crime has nothing to do with proportionality—a comparison of *significance*—but has instead to do with *causal connection* between the property and the crime. *See* Waples, *supra*, § 162.

Other than the (incomplete) overlap between "fines" and "forfeitures" and the occasional observations courts have made regarding limits to the innocent-owner doctrine, the only other justification *Austin* provided for the proposition that *in rem* forfeitures are punishments is that the forfeiture provisions at

issue "expressly provide[d] an 'innocent owner' defense," which *Austin* suggested made those provisions "look more like punishment, not less." 509 U.S. at 619. Here again, however, the historical evidence corrects modern misconceptions. As Bishop's treatise explained, the essential attribute of an *in rem* forfeiture is that it proceeds against the property itself and is justified "by reason of [the property's] circumstances," such as how the property has been used. Bishop, *supra*, § 709. Such a forfeiture "is not to be deemed a punishment inflicted on its owner," and "it follows, that, if the law, in its clemency, permits the owner still to retain his property and avoid the forfeiture on showing himself innocent of any wrong in the matter, *there is no more a punishment involved in the case than there was before.*" *Id.* (emphasis added).

The historical evidence thus indicates that a legislature's decision to provide relief from an *in rem* forfeiture if the owner shows himself to be innocent is irrelevant to whether the forfeiture is a penalty and thus irrelevant to the applicability of the Excessive Fines Clause. Indeed, making the Excessive Fines Clause's applicability turn on the existence of an exception for innocent owners would encourage precisely the sort of draconian rules the Clause is meant to prevent: It would motivate legislatures to refuse to grant any exceptions to innocent owners, lest they subject *in rem* forfeitures to proportionality review by courts. Statutory exceptions for innocent owners have long been used to mitigate the sometimes-harsh consequences of *in rem* forfeitures. *See* Waples, *supra*, § 148 ("[T]he general principle, that forfeiture is irre-

spective of owner, is subject to legislative modification."). For good reasons, no court has held that such exceptions transform *in rem* forfeitures into penalties.[5]

4. If the Court were to reconsider *Austin*, the factors pertinent to "deciding whether to overrule a past decision" all weigh in favor of overturning it. *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2478 (2018). As discussed above, *Austin* is not "consisten[t] with other related decisions," *id.*, and the historical evidence shows the poor "quality of [its] reasoning." *Id.*

In addition, overturning *Austin* would not frustrate significant "reliance" interests. *Id.* at 2479, 2484. *Austin* expressly declined to articulate any

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[5] Historical evidence also flatly contradicts the contention of *amici* that historical *in rem* forfeitures were different than modern-day *in rem* forfeitures because the "essential evidence underlying" historical forfeitures "was both indisputable and borne by the defendant property itself as found and seized without more." Cause of Action Institute Amicus Br. 21. Nineteenth-century *in rem* forfeiture proceedings frequently required evidence in addition to the *res* itself. *See generally* Waples, *supra*, § 148 (listing examples of statutory *in rem* forfeitures). A ship, for example, could not by itself show that it was used to violate an embargo; the captain would need to testify where the ship docked. *See, e.g.*, *The Little Charles*, 26 F.Cas. 979, 982 (C.C.D. Va. 1818). Nor could a ship demonstrate that it was used to violate a state fishing law; witnesses would need to testify regarding where and how the ship was used. *See, e.g.*, *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823). Similarly, without witness testimony, a court could not know whether vehicles transporting alcohol were used *for the purpose of* evading the revenue laws. *See, e.g.*, *United States v. Two Bay Mules*, 36 F. 84 (W.D.N.C. 1888).

standard for assessing the excessiveness of *in rem* forfeitures, 509 U.S. at 622–23, much less "define[] . . . a clear or easily applicable standard," *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2098, (2018); *see also Janus*, 138 S. Ct. at 2484.

In any case, *Austin* has prompted no significant practical consequences. In the quarter-century since the decision, federal courts have held *in rem* forfeitures to be unconstitutionally excessive only a dozen times.[6] The number of unconstitutional *in rem* forfeitures is strikingly low, particularly in light of the tens of thousands of assets—to say nothing of the dollar value of those assets—the Department of Justice seizes each year. Department of Justice, *5-yr Summary of Seizure and Forfeiture Trends*, https://www.justice.gov/afp/file/5-yr_forfeiture_trends.pdf/download.

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[6] *United States v. One Single Family Residence*, 13 F.3d 1493 (11th Cir.1994); *von Hofe v. United States*, 492 F.3d 175, 191 (2d Cir. 2007); *United States v. $120,856 in U.S. Currency*, 394 F.Supp.2d 687 (D.V.I. 1993); *United States v. 835 Seventh Street*, 820 F.Supp. 688 (N.D.N.Y. 1993); *United States v. 461 Shelby County Road 361*, 857 F.Supp. 935, 940 (N.D. Ala., 1994); *United States v. 6625 Zumirez Drive*, 845 F.Supp. 725, 742 (C.D. Cal. 1994); *United States v. One 1988 White Jeep Cherokee*, 30 V.I. 75, 80 (D.V.I. 1994); *United States v. Shelly's Riverside Heights Lot X*, 851 F.Supp. 633 (M.D. Pa. 1994); *United States v. 3636 Roselawn Ave.*, 1994 WL 524985 (C.D. Cal. 1994); *United States v. 18900 S.W. 50th Street*, 915 F.Supp. 1199 (N.D. Fla. 1994); *United States v. $293,316 in U.S. Currency*, 349 F.Supp.2d 638 (E.D.N.Y. 2004); *United States v. Ford Motor Co.*, 442 F.Supp.2d 429, 437 (E.D. Mich. 2006).

B. If the Court interprets the Excessive Fines Clause to extend to *in rem* forfeitures, history shows that the Clause does not apply to the States

If the Court concludes that *Austin* requires rejecting an interpretation of the Excessive Fines Clause that applies the Clause only to *in personam* penalties, the historical evidence demands reading the Fourteenth Amendment not to incorporate the Excessive Fines Clause against the States. The Fourteenth Amendment was ratified in 1868. Yet no court applied the Excessive Fines Clause to *any in rem* forfeitures—state or federal—until *124* years later. *See United States v. 38 Whalers Cove Drive*, 954 F.2d 29, 32 (2d Cir. 1992). States imposed countless *in rem* forfeitures during that long stretch of history; it is highly unlikely that litigants and courts went nearly one-and-a-quarter centuries without an opportunity to argue that *in rem* forfeitures might be limited by the federal constitution. Much more likely is that the Fourteenth Amendment's ratifiers did not understand the Amendment to apply a proportionality requirement to States' *in rem* forfeitures.

Even beyond evidence of the Fourteenth Amendment's original meaning, historical evidence establishes that the right Timbs asserts here—to be free from "disproportionate" *in rem* forfeitures—is neither "fundamental to our scheme of ordered liberty," nor "deeply rooted in this Nation's history and tradition." *McDonald*, 561 U.S. at 767 (internal quotation marks and emphasis omitted). Far from being fundamental

or deeply rooted, the rule Timbs seeks to apply against the States is a mere twenty-five years old. In contrast, the practice here, the "[f]orfeiture of vehicles bearing [contraband,] is one of the time-honored methods adopted by the government for the repression of . . . crime." *Gen. Motors Acceptance Corp. v. United States*, 286 U.S. 49, 56 (1932).

No contemporaneous evidence attests to the *existence*, much less the fundamentality, of a rule requiring *in rem* forfeitures to be proportional, and the few cases to consider this rule before the late twentieth century *rejected* it. *See House and Lot*, 204 Ala. 108 at 108–09; *Thornson*, 170 Minn. at 352–53; *Moore*, 293 Ky. at 55. A greater contrast with the voluminous evidence the Court compiled in *McDonald* is scarcely imaginable. *Cf. McDonald*, 561 U.S. at 767–78. If the Excessive Fines Clause applies to *in rem* forfeitures, it cannot apply to the States.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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Appendix
State Constitution
Excessive Fines Clauses

State	First Excessive Fines Clause	Subsequent Clauses
AL	ALA. CONST. of 1819, art. I, § 16	Analogous provision present in the current Alabama constitution and the constitutions of 1901, 1875, 1868, 1865, 1861.
AR	ARK. CONST. of 1836, art. II, § 17	Analogous provision present in the current Arkansas constitution and the constitutions of 1874, 1868, 1864, 1861.
CA	CAL. CONST. of 1849, art. I, § 6	Analogous provision present in the current California constitution and the constitution of 1879.
CT	CONN. CONST. of 1818, art. I, § 13	Analogous provision present in the current Connecticut constitution and the constitution of 1965.

State	First Excessive Fines Clause	Subsequent Clauses
DE	DEL. CONST. of 1792, art I, § 11	Analogous provision present in the current Delaware constitution and the constitutions of 1897, 1831.
FL	FLA. CONST. of 1838, art. I, § 12	Analogous provision present in the current Florida constitution and the constitutions of 1968, 1885, 1868, 1865, 1861.
GA	GA. CONST. of 1777, art. LIX	Analogous provision present in the current Georgia constitution and the constitutions of 1983, 1976, 1945, 1877, 1868, 1865, 1861.
IL	ILL. CONST. of 1818, art. VIII, § 14	Proportionality of penalties clause. Analogous provision present in the current Illinois constitution and the constitutions of 1970, 1870, 1848.

State	First Excessive Fines Clause	Subsequent Clauses
IN	IND. CONST. of 1816, art. I, § 15	Analogous provision present in the current Indiana constitution and the constitution of 1851.
IA	IOWA CONST. of 1857, art. I, § 17	Analogous provision present in the current Iowa constitution.
KS	KAN. CONST. of 1859, Bill of Rights, § 9	Analogous provision present in the current Kansas constitution.
KY	KY. CONST. of 1792, art. XII, § 15	Analogous provision present in the current Kentucky constitution and the constitutions of 1850, 1799.
LA	LA. CONST. of 1864, tit. VII, art. CVII	Analogous provision present in the constitutions of 1921, 1913, 1898, 1879, and 1868; 1974 constitution contains a more generic excessive punishment clause.

State	First Excessive Fines Clause	Subsequent Clauses
ME	ME. CONST. of 1820, art. I, § 9	Proportionality of penalties clause. Analogous provision present in the current Maine constitution.
MD	MD. CONST. of 1776, art. XXII	Analogous provision present in the current Maryland constitution and the constitution of 1867 while the 1846 and 1776 constitutions prohibited cruel and unusual penalties.
MA	MASS. CONST. of 1780, pt. I, art. XXVI	Analogous provision present in the current Massachusetts constitution.
MI	MICH. CONST. of 1835, art. I, § 18	Analogous provision present in the current Michigan constitution and the constitutions of 1963, 1908, 1850.

State	First Excessive Fines Clause	Subsequent Clauses
MN	MINN. CONST. of 1857, art. I, § 5	Analogous provision present in the current Minnesota constitution.
MS	MISS. CONST. of 1817, art. I, § 16	Analogous provision present in the current Mississippi constitution and the constitutions of 1890, 1868, 1832.
MO	MO. CONST. of 1820, art. XIII, § 12	Analogous provision present in the current Missouri constitution and the constitutions of 1945, 1875, 1865.
NE	NEB. CONST. of 1867, art. I, § 6	Analogous provision present in the current Nebraska constitution and the constitution of 1875; the current Nebraska constitution also contains a separate proportionality clause, NEB. CONST. art. I, § 15.

State	First Excessive Fines Clause	Subsequent Clauses
NV	NEV. CONST. of 1864, art. I, § 6	Analogous provision present in the current Nevada constitution.
NH	N.H. CONST. of 1784, pt. I, art. XXXIII	Analogous provision present in the current New Hampshire constitution.
NJ	N.J. CONST. of 1844, art. I, § 15	Analogous provision present in the current New Jersey constitution and the constitution of 1947.
NY	N.Y. CONST. of 1846, art. I, § 5	Analogous provision present in the current New York constitution and the constitution of 1894.
NC	N.C. CONST. of 1776, Declaration of Rights, § 10	Analogous provision present in the current North Carolina constitution and the constitutions of 1971, 1868.

State	First Excessive Fines Clause	Subsequent Clauses
OH	OHIO CONST. of 1802, art. VIII, § 13	Analogous provision present in the current Ohio constitution and the constitutions of 1912, 1851.
OR	OR. CONST. of 1857, art. I, § 16	Analogous provision present in the current Oregon constitution.
PA	PA. CONST. of 1776, ch. II, § 29	The 1776 Pennsylvania constitution contained a moderate fines clause while the constitutions of 1968, 1874, 1838, 1790 and the current Pennsylvania constitution contain an excessive fines clause.
RI	R.I. CONST. of 1842, art. I, § 8	Analogous provision present in the current Rhode Island constitution and the constitution of 1986.

State	First Excessive Fines Clause	Subsequent Clauses
SC	S.C. CONST. of 1778, art. XL	The 1778 South Carolina constitution contained a proportionality of punishments clause while the constitutions of 1865, 1861, 1790 and the current South Carolina constitution contain an excessive fines clause.
TN	TENN. CONST. of 1796, art. XI, § 16	Analogous provision present in the current Tennessee constitution and the constitutions of 1870, 1835.
TX	TEX. CONST. of 1836, Declaration of Rights, § 11	Analogous provision present in the current Texas constitution and the constitutions of 1875, 1869, 1866, 1861, 1845.

State	First Excessive Fines Clause	Subsequent Clauses
VT	VT. CONST. of 1777, ch. II, § 26	The 1777 Vermont constitution contained a moderate fines clause while the 1786 and current Vermont constitutions contain a proportionality of fines clause.
VA	VA. CONST. of 1776, Declaration of Rights, § 9	Analogous provision present in the current Virginia constitution and the constitutions of 1971, 1902, 1870, 1864, 1851, 1830.
WV	W. VA. CONST. of 1862, art. II, § 2	Analogous provision present in the current West Virginia constitution and the constitution of 1872.
WI	WIS. CONST. of 1848, art. I, § 6	Analogous provision present in the current Wisconsin constitution.